No. 11689

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

WESTERN UNION TELEGRAPH COMPANY, a corporation
Appellant,

vs.

HANSEN & ROWLAND CORPORATION, a corporation,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

APPELLANT'S REPLY BRIEF

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The plaintiff's restatement of the case (Brief of Appellee, pp. 1-7) seems to have added for the consideration of this court no material fact not listed by the defendant's factual outline (Brief of Appellant, pp. 2-4; 7-9). The only aim of the plaintiff's restatement of the case appears to have been to justify the sum of $750 per month as the reasonable rental value of the premises by recitals regarding the several extensions to the term of the old lease between the plaintiff and the defendant, which had fixed the rental at $325 per month — an unnecessary effort, since the claim of the defendant's answer that $500 per month was actually the maximum reasonable rental value, had been waived probably by the defendant's tenders

of $750 per month and certainly by its stipulation of that amount as the reasonable rental value (R. 34, 39).

On the record in this case three possible rulings were open to the District Court, to-wit:

(a) TENANT BY AGREEMENT. That the defendant having impliedly accepted, by continued occupancy, the plaintiff's offer in its letter dated October 8th, the defendant's possession after October 31st was lawful, with the accompanying obligation to pay rent at $1500 per month; and that, being in default as to fifty per cent of the agreed rent, the defendant was liable for the unpaid balance of rent, plus penalty in a sum equivalent to the whole rent (a total of $3000 per month) under sub-section (3), §812, Rem. Rev. Stat.

(b) TRESPASSER. That the defendant having rejected the plaintiff's offer in its letter dated October 8th, the defendant's possession after October 31st was unlawful, with obligation to pay damages in the reasonable rental value of the premises at $750 per month; and that, being a trespasser, the defendant was liable not only for damages in such amount, but also for penalty in a sum equivalent thereto (a total of $1500 per month) under sub-section (1) of §812, Rem. Rev. Stat.

(c) TENANT BY SUFFERANCE. That the plaintiff, on November 2nd, by its alternative notice to quit the premises held or to pay the rental demanded (R. 45; Ex. 5), elected as a matter of Washington law to treat the defendant not as a trespasser but as a tenant whose possession was obtaining without the

plaintiff's consent in the absence of agreement as to the rate of rental, and whose obligation was limited to the payment of the reasonable rental value of the premises (at the rate of $750 per month)—an obligation under Rem. Rev. Stat. §10621 already satisfied by the defendant's tenders to the plaintiff and payments into court.

The plaintiff's contention at the trial that the defendant was a *tenant by agreement* based on implied acceptance of the plaintiff's demand for payment of rental at $1,500.00 per month resulting solely from the defendant's continued occupancy after October 31st, was rejected by the District Court (R. 7, 60, 62; Brief of Appellee, p. 14). In the face of the defendant's refusal to sign its acceptance of the plaintiff's proposal by letter of October 8th and in the face of the defendant's successive tenders of rental at $750.00 per month, the plaintiff's contention was unsound (Ex. 3, 4, 6, 7, 8, 9; R. 44, 58, 59). The plaintiff's contention was advanced, before the lower court as before this court, without supporting citation of any Washington decision (Brief of Appellee, p. 14). The District Court rightly refused to adopt the plaintiff's theory that the defendant was a tenant by agreement with obligation to pay rental at $1,500.00 per month and with liability for double penalty under sub-section (3) of §812. The plaintiff has not preserved its contention for reargument by cross-appeal (Brief of Appellee, p. 14).

With this simplification, the single problem remaining for determination in this case is whether

during its disputed occupancy beginning November 1st, 1946, and ending March 7th, 1947, the defendant was a *trespasser* under the penalty of sub-section (1) §812, or a *tenant by sufferance* under the protection of §10621.

The District Court held that the defendant was a trespasser, guilty of unlawful detainer as defined by sub-section (1) of §812, with liability to pay damages measured by the reasonable rental value of the premises at the rate of $750 per month (tendered by defendant and deposited in court) and also with liability to pay penalty in the additional sum of $750 per month.

This conclusion of the District Court, with its consequent judgment, the defendant contends was erroneous because on the particular facts involved the defendant was not guilty of unlawful detainer nor subject to the attached penalty, but rather was a tenant by sufferance without any default in payment of "reasonable rent" at the rate of $750, which was its full legal liability under §10621.

In urging this contention the defendant is not disputing but applying the pertinent statutes of the State of Washington and the related opinions of the Washington Supreme Court. To maintain this contention the defendant need not quarrel with the authorities upon which the plaintiff relies by reference and quotation (Brief of Appellee, pp. 16-21). The plaintiff's cited cases merely declare that *if* an occupant is guilty of unlawful detainer under sub-section (1) of §812 it is liable to pay damages measured by the reasonable

rental value of the premises plus penalty in an additional equivalent amount.

The weakness of the District Court's ruling and of the plaintiff's position is that neither is supported by any Washington decision which adjudges upon a parallel chain of factual incidents that the occupant of premises was actually guilty of unlawful detainer —that being the only basis for liability to pay either damages as such or penalty thereon.

Again reciting for clarity and emphasis the particular facts of this case, during a period of years ending October 31, 1946, the defendant had been a tenant in lawful possession of the premises by valid written lease (with successive extensions each for a specified term) under which all rent was timely and fully paid (R. 37, 38, 57). After October 31st the defendant continued to occupy the premises until March 7th, 1947 (R. 40, 59).

On these facts the District Court was correct in concluding that if the defendant was at all guilty of unlawful detainer as variously prescribed by the several sub-sections of the Washington statute, it must be guilty only under the definition of sub-section (1) §812. To re-quote that provision, it reads:

> "A tenant of real property * * * is guilty of unlawful detainer * * * when he holds over or continues in possession * * *after the expiration of the term for which it is let to him.
>
> "In all cases where real property is leased for a specified term or period * * * the tenancy shall be terminated without notice at the expira-

tion of such specified term or period." (Subsection (1) §812).

Because of the automatic extension clause contained in the formal written lease, the plaintiff's notice to stop the same by letter of July 24th was necessary (R. 40; Ex. 1). But the plaintiff and the defendant agree that as of October 31st, 1946, the lease was ended (Brief of Appellee, p. 3). Also they agree that the plaintiff's unqualified notice to surrender the premises, dated September 25th, was superfluous (Ex. 2; R. 42; Brief of Appellee, p. 3). Such notice was superfluous because of the latter portion of subsection (1) §812, just quoted, and because of the language in §10620, Rem. Rev. Stat. (Brief of Appellee, p. 9).

The lease being terminated on October 31st, had the plaintiff allowed time alone to follow, the defendant would have been a trespasser guilty of unlawful detainer for "holding over" under sub-section (1), §812. However, the plaintiff had previously disclosed by its letter of October 8th (Ex. 3; R. 43) that, provided the defendant would pay $1,500 per month to cover both reasonable rent and special damages as claimed, then the plaintiff was willing the defendant continue its occupancy. So, with its desire on the $1,500 the plaintiff added another link to the chain of incidents by serving a third notice upon the defendant—the notice dated November 2, 1946, the alternative notice allowing the defendant the option either "to pay" or "to quit" (Ex. 5; R. 45).

This notice recited that the rental "became due and

payable on the first day of November, 1946;" it was retroactive.

This notice was not essential to perfect the plaintiff's right or remedy against the defendant as a trespasser for "holding over" under sub-section (1), §812, by which no notice whatsoever was required for any purpose.

This last notice by the plaintiff was purely voluntary.

Such a notice has been construed by the Washington Supreme Court to constitute an election by a landlord to treat an occupant of premises as a tenant rather than as a trespasser. In this ruling that court said:

> "* * * although appellant entered without the knowledge or express permission of respondents, yet they immediately gave their permission by demanding the rent; and the notice to quit or pay rent, in itself shows permission on their part."
>
> *Williamson v. Hallett*, 108 Wash. 176, 179, 182 Pac. 940, 941.

In other words, on November 2nd the plaintiff, by its own choice, elected to convert the defendant's unlawful possession into lawful possession on and after November 1st. However, the plaintiff's alternative notice of November 2nd could not alone effect agreement between the plaintiff and the defendant as to the rate of rental. Hence, by such notice, the defendant became not a tenant by contract but a tenant by law, since the defendant's possession obtained without permission or consent of the plaintif in the

absence of rental payment as demanded at the rate of $1,500 per month.

Such tenancy by operation of law, known as tenancy by sufferance in the State of Washington, is declared by statute in Rem. Rev. Stat. §10621 and recognized by decision in numerous cases, of which the defendant has already cited a few:

Klee v. U. S., 53 F.(2d) 58, 59, 61 (C.C.A. 9);

McCourtie v. Bayton, 159 Wash. 418, 422, 423, 294 Pac. 238, 240;

Provident Mutual Life Insurance Co. v. Thrower, 155 Wash. 613, 616; 285 Pac. 654, 655;

Williamson v. Hallett, 108 Wash. 176, 178, 179; 182 Pac. 940, 941.

Struggling against the obvious conclusion, from which the defendant would be exonerated of all liability to the plaintiff over and above the reasonable rental value of the premises at the rate of $750, which had been timely and fully tendered month by month, the plaintiff argues that "to constitute a tenancy by sufferance" a necessary condition is the "obtaining possession of the premises without the consent of the owner"—a "condition not present here" because the defendant "was let into peaceful possession of the premises by the owner under a valid lease" (Brief of Appellee, pp. 9, 10).

But the plaintiff's argument assumes incorrect and unfair limitation of the meaning of the word "obtains" in the text of Rem. Rev. Stat. §10621. The

verb is defined to mean not only "to gain," "to procure," "to acquire," but also "to hold," "to keep," "to possess," "to occupy" and "to have a firm footing," "to be recognized or established," and "to be prevalent or general, as the custom *obtains*" (Webster's New International Dictionary [2nd Ed.] p. 1682).

Further the plaintiff's argument is incompatible with the established law of Washington as reflected by the State Supreme Court through its most recent applicable decision in *Davis v. Jones*, 15 Wn.(2d) 572; 131 P.(2d) 430.

In that case the defendant occupant, according to the court's recitals (Opinion: 131 P.(2d) 432) had "refused to pay the rent" in any amount before suit. On that account the defendant there was held guilty of unlawful detainer under sub-section (3), §812, and held liable for penalty despite delayed tenders into court after suit—for which latter reason the holding was cited by the plaintiff in the present case (Brief of Appellee, p. 19).

However, in citing that case the plaintiff missed or disregarded the facts disclosed in the court's opinion surrounding and initiating the tenancy of the defendant occupant, which was judicially classified as a tenancy by sufferance.

In that case certain residence property was owned by a sister and managed by her brother who, during his lifetime, permitted the defendant occupant to use the same without obligation for or payment of rent. After the brother's death the sister as owner of the premises demanded rent, which was totally

refused by the defendant occupant on the claim that no relationship of landlord and tenant existed.

The court ruled that the sister as owner was bound by her brother's act as the manager of the premises in allowing the defendant occupant to use the same rent free until the brother's death; but that *thereafter the continued occupancy of the defendant "constituted a tenancy by sufferance,"* (Opinion: 131 P.(2d) 431) under which the defendant had been bound to pay the reasonable rental value of the property as provided by §10621.

This "last word" of the Washington Supreme Court in *Davis v. Jones*, 15 Wn.(2d) 572; 131 P.(2d) 430, demonstrates that a tenancy by sufferance can follow an original possession which is both peaceful and lawful; and rejects clearly and completely the plaintiff's argument in the present case that tenancy by sufferance cannot arise except from an initial unlawful entry.

Next the plaintiff argues that tenancy by sufferance could exist only in the "absence of a demand on the part of the owner for a surrender of possession," and that "the statutory written demand was made on" the defendant in this case by the plaintiff (Brief of Appellee, pp. 9, 10).

This argument, while sound as a matter of law is unsound as a matter of fact on the record in this case, since the last and final demand served upon the defendant by the plaintiff was its notice of November 2nd (Ex. 5; R. 45), alternatively allowing the defendant "to pay" or "to quit"—the very same notice

from which the tenancy by sufferance arose, according to the law of Washington as declared by its Supreme Court, in the light of which it would be illogical and inconsistent to rule that this identical notice in a single moment should operate both to create and destroy such a tenancy.

After the service of this notice on November 2nd during the defendant's continued occupancy, the plaintiff never made any unqualified or absolute demand for surrender of the premises. Even in this action the plaintiff refrained from praying in its complaint or seeking by other application the issuance of a writ of restitution for immediate restoration of possession as authorized by §819 Rem. Rev. Stat. (R. 7, 8).

The simple, unadulterated truth is the plaintiff wanted the $750 per month, being paid, if the plaintiff couldn't get the $1,500 per month, being demanded.

Concluding its argument plaintiff asserts that this appeal "is so devoid of merit" as to "present the appearance of having been sued out merely for delay" and as to warrant imposition of punitive damages under this court's Rule 26 (Brief of Appellee, pp. 24, 25).

Concluding its reply argument in the same spirit of charity, the defendant suggests that the plaintiff's demand of $1,500 per month (to cover $750 as "reasonable rental," which admittedly was duly tendered, and to cover $750 special damages, which admittedly were never suffered) was so extortionate as

to place the defendant in a position of equity, entitling it to every legal and just relief within the power of this court.

Respectfully submitted,

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